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No. 98-875

Supreme Court, U.S.
FILED
FEB 8 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVISTER CORPORATION,

Petitioner,

--v--

UNITED REPUBLIC LIFE INSURANCE COMPANY AND ROBERT E. WILCOX, UTAH INSURANCE COMMISSIONER AND LIQUIDATOR OF UNITED REPUBLIC LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The circuits are split concerning the proper analysis to determine whether a state statute regulates the "business of insurance," requiring reverse-preemption of a conflicting federal statute pursuant to the McCarran-Ferguson Act. This issue has become a source of confusion among the circuits. Some circuits examine the conduct at issue before analyzing the state statute regulating that conduct. Conversely, other circuits fail to analyze the conduct. The Tenth Circuit, in *Davister*, was among the latter circuits. Without this Court's clarification, the circuits will continue

to issue divergent opinions regarding preemption of federal law by conflicting state statutes enacted for the purpose of regulating the business of insurance.

I. FEDERAL COURTS MUST EXAMINE THE CONDUCT AT ISSUE WHEN RELYING ON THE McCARRAN-FERGUSON ACT'S REVERSE PREEMPTION OF A FEDERAL STATUTE BY A STATE STATUTE.

The McCarran-Ferguson Act leaves the regulation and the taxation of the insurance business to the States. 15 U.S.C. § 1012(a). The threshold question in determining whether the McCarran-Ferguson Act reverse preempts a federal statute is whether the conflicting state statute regulates the "business of insurance."

An inquiry into whether the specific conduct constitutes the business of insurance is supported by the legislative history of the McCarran-Ferguson Act as well as this Court's precedent. As explained by this Court in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1969) (citations omitted):

> The [McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance companies . . .Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. . . .Congress was concerned with the type of state regulation that centers around the contract of insurance. . .The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status

> as reliable insurers that they too must be place in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder.

Thus, even though a state has a statute regulating the challenged conduct, the court must still address whether that statute was meant to fall under the protection of the McCarran-Ferguson Act. This is achieved by first deciding whether the specific conduct at issue constitutes the business of insurance. *United States v. Fabe*, 508 U.S. 491, 505 (1993).

II. THE CIRCUIT COURTS ARE SPLIT ON WHETHER TO CONSIDER THE SUBJECT OF THE STATE'S CONFLICTING STATUTE.

The court, in *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3rd Cir. 1998), describes the conflict among the circuits concerning the analysis to be applied to a state statute for reverse-preemption purposes. The court noted that "federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion." *Id.* at 189 n. 2. For example, the Second, Third, Sixth, and Ninth Circuit use a four-part test which includes a consideration of the parties' conduct,[1] while other courts, including the First and Eighth Circuits, use "a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance." *Id.* Still other courts have noted that this three-part test is simply not relevant in determining what constitutes the business of insurance in a non-

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[1] See *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3rd Cir. 1998); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384 (6th Cir. 1996); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc.*, 50 F.3d 1486 (9th Cir. 1995); and *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

antitrust context. See *Doe v. Norwest Bank Minn.*, 107 F.3d 1297, 1305 n. 8 (8th Cir. 1997).

This Court, in *Fabe*, examined the subject of a state insurance statute in conflict with a federal statute to determine whether the state statute regulated the "business of insurance." In that case, the liquidator, appointed under Ohio law for an insolvent insurance company, brought a declaratory judgment action to establish the priority of the claims asserted by the United States. The Ohio statute conferred fifth priority upon claims of the United States in proceedings to liquidate insolvent insurance companies. The federal statute accorded first priority to the United States with respect to a bankrupt debtor's federal obligations. This Court concluded that the Ohio priority statute was exempt from preemption under the McCarran-Ferguson Act to the extent it protected policyholders, but it is not a law enacted for the purpose of regulating the business of insurance to the extent that it is designed to further the interests of creditors rather than policyholders. This Court examined the underlying activity -- the enforcement of contracts between the insured and the insurer -- and concluded that the state priority statute did not regulate the "business of insurance." This Court also reemphasized its holding in *SEC* that the focus of the McCarran-Ferguson Act is the relationship between the insurance company and its policyholders. *Fabe*, 508 U.S. at 501.

The Tenth Circuit failed to inquire as to whether the specific conduct between Davister and United Republic constituted the business of insurance. The precise question before the district court was whether to compel specific performance of an arbitration clause in a stock purchase agreement forming part of a real estate transaction. The subject , a real estate contract, had no connection to policyholders or their policies. In fact, United Republic has no policyholders. As Judge Lucero noted in his dissent, "The deliberately narrow holding of *Fabe* forecloses a scope of reverse preemption so broad that it could encompass the arbitration of such a contract." (Pet. App. at 15a.)

Instead of first examining the specific conduct at issue, the Tenth Circuit went directly to an analysis of *Utah Code Ann.* § 31A-27-317(1) under the McCarran-Ferguson Act. The court decided that the Utah statute, which provides that a petition for liquidation stays all actions and proceedings against an insurer, was enacted to regulate the business of insurance. Yet without examining the specific conduct, the Tenth Circuit's analysis of the statute is premature. As Judge Lucero argued in his dissenting opinion, the facts before the court "are not related to the business of insurance as defined in *Fabe*." (Pet. App. 15a.) As a result, the Tenth Circuit's analysis of the Utah statute, without an analysis of the specific conduct, amounts to nothing more than a *per se* stay of all proceedings involving a liquidated insurer. This result is contrary to this Court's precedent and the Congressional intent of the McCarran-Ferguson Act which limits the "business of insurance" to specific conduct directly affecting the relationship between the insurer and the insured. See *SEC*, 393 U.S. at 459-60.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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